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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

ROBERT A. CLARKE,

Petitioner,

v.

HOWARD BUTCHER, IV; RUDI P. FRONK; GEORGE J. HARTNETT; PAUL R. SUTTON; GEORGE G. BLAKEY; WARREN H. HINKS, JR.; JAMES A. MARTIN, FENNOSCANDIA BANK LIMITED and DRX, INC.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether petitioner's appeal to the Third Circuit of the Court of Appeals was correctly decided pursuant to Chapter 6 of the Internal Operating Procedures of the Third Circuit.

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Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

The petitioner, Robert A. Clarke ("petitioner" or "Clarke") respectfully urges that this Honorable Court grant this petition for Writ of Certiorari, seeking review of the judgment of the United States Court of Appeals for the

Third Circuit affirming the judgment of the District Court for the District of Delaware.

OPINIONS BELOW

The Memorandum Opinion and Order of the District Court for the District of Delaware, filed February 1, 1991, appear as Appendix A.

The Memorandum and Order re. Admissibility of Evidence, filed February 1, 1992, appears as Appendix B.

The Memorandum and Order of the District Court re. Defendants' Motion to Preclude a Claim, filed February 1, 1991, appears as Appendix C.

The Memorandum Opinion and Order of the District Court, filed June 12, 1991, re. Motion for Reconsideration and Motion to Extend Time to File Notice of Appeal, appear as Appendix D.

The Judgment Order of the Third Circuit, filed March 23, 1992, appears as Appendix E.

The Order of the Third Circuit, filed April 16, 1992, denying appellant's petition for rehearing, appears as Appendix F.

JURISDICTION

The decision of the Third Circuit was filed March 23, 1992. On April 16, 1992, the Third Circuit filed an Order denying Clarke's petition for rehearing.

The period pending decision on Clarke's petition for rehearing tolled the period in which the petition for certiorari must be filed. Thus this petition is timely filed.

Jurisdiction is invoked pursuant to section 1254(1) of Title 28 of the United States Code.

RULES AND STATUTES INVOLVED IN THE CASE

1. The Internal Operating Procedures ("IOP's") of the Third Circuit, provide, at Chapter 6, subsections 6.1 and 6.2:

6.1 Panel Unanimity

"A case may be terminated in this court by a judgment order upon the unanimous decision of the panel."

6.2 Criteria

6.2.1 "A judgment order is filed when the panel unanimously determines to affirm the judgment or order of the district court or decision of the Tax Court, enforce or deny review of a decision or order of an administrative agency, or dismiss the appeal or petition for review for lack of jurisdiction or otherwise, and determines that a written

opinion will have no precedential or institutional value."

6.2.2 A judgment order may be used when:

(a) The judgment of the district court is based on findings of fact which are not clearly erroneous;

(b) Sufficient evidence supports a jury verdict;

(c) Substantial evidence on the record as a whole supports a decision or order of an administrative agency;

(d) No error of law appears;

(e) The district court did not abuse its discretion on matters addressed thereto; or

(f) The court has no jurisdiction.

2. 17 C.F.R. section 240.14a-9(a) (Appendix G)

3. F. R. Civ. P. 52(a) (Appendix G)

4. Del. Code Ann. tit. section 141(b) (Appendix G)

STATEMENT OF THE CASE

A. Summary of Proceedings Below

On April 6, 1990, petitioner filed a complaint in the District Court for the District of Delaware which included allegations that certain respondents had violated the federal securities laws resulting in their unlawful election as directors, and that a director resigned and had not been lawfully re-elected.

The District Court conducted a bench trial in December 1990, and at the conclusion of the trial invited the parties to submit post-trial written argument.

On February 1, 1991, the District Court entered judgment for the respondents in respect of all the allegations, and filed its Order and Memorandum Opinion (Appendix A). Also on February 1, 1991, the District Court filed Memorandums and Orders in respect of (i) admissibility of evidence and (ii) a motion precluding petitioner from supporting a claim. (Appendices B and C)

On February 21, 1991, petitioner filed a motion for reconsideration, and on June 12, 1991, the District Court denied that motion (Appendix D).

Petitioner appealed certain of the District Court decisions to the Third Circuit, which denied the appeal by judgment order on March 23, 1992, and denied a petition for rehearing on April 16, 1992. (Appendices E & F)

In essence, the petitioner's appeal to the Third Circuit contended that the District Court had erred at law, that it had incorrectly determined its findings of fact, and that it had thus abused its discretion.

More specifically, the petitioner contended that the District Court had incorrectly interpreted 17 C.F.R. Section 140.14a-9(a) (proxy statements and corrections) and 8 Del. C. Section 141(b) (resignation of directors), and that certain of the District Court findings of fact should be set aside as clearly erroneous (Fed. R. Civ. P. 52(a)).

B. Basis for Federal Jurisdiction in Court of First Instance

The complaint was filed pursuant to Section 27 of the Securities Exchange Act

of 1934, 15 U.S.C. Section 78aa, and under principles of pendent jurisdiction.

The pre-trial order stated that subject matter jurisdiction was based on 28 U.S.C. Sections 1331 and 1332.

C. Facts Pertinent to Determination of the Petition

The appellee brief of respondents DRX, Inc., Howard Butcher IV, George J. Hartnett, George G. Blakey, Rudi P. Fronk and James R. Martin ("DRX respondents") stated:

"This is a case that turns largely on the facts. While there are legal issues, their resolution depends primarily on the facts found. The resolution of those factual issues, in turn, depends largely on the credibility of the witnesses."

The main issues of the petitioner's appeal to the Third Circuit concerned the District Court decisions regarding the allegations:

(i) that respondents violated federal securities laws by fraudulently issuing, and not thereafter correcting, a proxy statement in respect of material matters requiring proper disclosure ("respondents' proxy");

(ii) that George G. Blakey ("Blakey") resigned and was not lawfully re-elected ("Blakey resignation");

(iii) that FennoScandia Bank Limited ("FennoScandia") and Warren H. Hinks, Jr. ("Hinks") agreed stage one of a plan to oust petitioner from DRX, Inc. ("DRX"); and,

(iv) regarding FennoScandia's loan to Alexandra Mining Company ("Alexandra Mining"), an affiliate of the petitioner.

A synopsis of relevant facts now follows. Where those facts are disputed, it is so noted.

1. Background

Petitioner was president, chief executive officer and chairman of the board of DRX, a public company involved in the gold industry.

Petitioner was also the principal shareholder of DRX, through his control of Alexandra Mining that had acquired approximately 30% of the common stock of DRX ("the DRX control stock") in January 1988.

The DRX control stock acquired by Alexandra Mining was pledged to

FennoScandia as security for a $4,000,000 loan ("Alexandra Mining loan").

Subsequent to petitioner acquiring control of DRX, DRX made acquisitions, including the acquisition of Westland Minerals Exploration Co ("Westland"), a corporation controlled by Hinks. DRX hired Hinks after the acquisition of Westland as president of Westland. Hinks later came to resent petitioner after DRX shares owned by Hinks were not included in an "S.3" registration with the Securities and Exchange Commission.

2. FennoScandia-Hinks Agreement

Hinks knew that petitioner's holding of the DRX control block was pledged to FennoScandia, and embarked on a plan to unseat petitioner from DRX. Hinks had previously told a colleague that he would do "whatever it took" to get control of

DRX, and in pursuance thereof, Hinks hired two agents, Alan Brown ("Brown") and Peter Webster ("Webster") to visit FennoScandia in London.

Several meetings and discussions took place between Hinks' agents and FennoScandia in the week commencing April 20, 1989, at which the financial condition of DRX was misrepresented. At that time, the Alexandra Mining loan was not in default, and Hinks' agents therefore proposed that FennoScandia would not renew the Alexandra Mining loan beyond June 30, 1989, in order to induce a default.

FennoScandia had ealier agreed, at a meeting with petitioner on March 17, 1989, to extend the Alexandra Mining loan beyond June 30, and knew that petitioner relied on that extension.

On April 28, 1989, FennoScandia wrote petitioner in furtherance of its agreement with Hinks that it would not renew the Alexandra Mining loan beyond June 30, 1989 ("non-renewal letter").

FennoScandia disclosed to Hinks' agents the contents of the non-renewal letter. FennoScandia denied this, and also denied that a FennoScandia officer, D. Hugh Adamson ("Adamson") had agreed to extend the Alexandra Mining loan beyond June 30, 1989 at his meeting with the petitioner on March 17, 1989.

Advest Corporation, an investment bank with whom petitioner was negotiating finance, learned, from disclosures Hinks' agent Webster had made, that FennoScandia was not renewing the Alexandra Mining loan. As a result, Advest did not proceed with those negotiations, but instead put

the matter "on the back burner for awhile until we see how the dust settles and see how this was going to come out".

Petitioner was unable to raise new funds, and FennoScandia was subsequently able to foreclose on the Alexandra Mining loan, and obtain the DRX control stock.

3. Blakey Resignation

By letter dated November 27, 1989, Blakey resigned as a DRX director, and was never thereafter properly re-elected. Blakey denied he resigned because he withdrew his resignation by letter dated December 5, 1989, and that petitioner did not acknowledge acceptance of Blakey's resignation as Blakey had asked.

4. Respondents' Proxy

On February 28, 1990, the DRX respondents, and respondents Hinks and Paul R. Sutton ("Sutton") mailed a proxy

and fight letter to DRX shareholders concerning a meeting to elect directors purportedly set for March 27, 1990 ("respondents' proxy").

The respondents' proxy did not disclose the FennoScandia-Hinks agreement although both Hinks and FennoScandia's representative Sutton were on the respondents' slate of directors for election at the March 27, 1990 meeting.

On or about March 15, 1990, the respondents received from petitioner an affidavit, sworn by Hinks's agent Webster, concerning the meetings with FennoScandia and FennoScandia's disclosure of the non-renewal letter ("Webster affidavit").

The DRX respondents did not question Hinks and Sutton regarding the matters revealed in, and the allegations of, the

Webster affidavit, and Hinks and Sutton never voluntered any explanation of the revelations and allegations of the Webster affidavit to the DRX respondents.

No correction was made to the respondents' proxy, although the Webster affidavit was received 12 days before the March 27, 1990 DRX shareholder meeting.

5. Fact Finding By District Court

The District Court's determination of the factual findings (that there was no agreement between FennoScandia and Hinks; that FennoScandia did not disclose that it was not renewing the Alexandra Mining loan; that there was no prior agreement to extend the Alexandra Mining loan; and that Blakey did not resign, rested solely on its assessment of trial witness credibility (Appendix A).

6. Subsequent Events

The petitioner filed his appeal to the Third Circuit pro se, and the Third Circuit subsequently affirmed the trial court's decisions by judgment order.

The appeal to the Third Circuit included documentary and other evidence which the petitioner contended clearly showed that the trial witness testimony on the key factual findings was false, that the District Court's construction of Blakey's November 27, 1989 resignation letter was incorrect, and that its factual findings were therefore clearly erroneous. A synopsis of that evidence now follows.

1. The Brown Memorandum

Hinks' agent Brown wrote a memorandum on May 4, 1989 ("Brown memorandum") which he presented to

FennoScandia management at a meeting on that date. The Brown memorandum recalled how:

> "Following last week's discussions re DRX, Bob Clarke, Alexandra Mines, et al and the current situation re the inability to declare a default.. "[b]etween now and June 30, Clarke has the ability to effectively protect his position.." (Emphasis added)

The Brown memorandum was admitted into evidence.

2. FennoScandia's Internal Memorandum

A FennoScandia internal memorandum stated that:

> "In view of the specialised nature of this transaction and our inability to liquidate this loan

other than in a way that could be potentially damaging both to ourselves and the customer, it is in our best interests to grant the extension...".

FennoScandia's internal memorandum was admitted into evidence.

3. FennoScandia's post-trial brief

Respondent FennoScandia wrote in its post trial brief to the District Court:

"By late June 1989, FennoScandia and Hinks followed separate paths ..... with inconsistent objectives .... and hired separate counsel".

FennoScandia's post-trial brief was admitted into evidence.

4. Howard Nichol Deposition

The deposition of L. Howard Nichol ("Nichol"), an Advest investment banker, showed Advest learned in mid May, 1989:

"[t]hat [Alexandra Mining] bank loan was going to be called or had been called,... and that it would mean trouble for DRX."

The Nichol deposition was admitted into evidence.

5. Blakey's resignation letter and trial testimony

Blakey's resignation letter stated in pertinent part:

"I would ask you therefore to regard this letter as formal notice of such resignation and to acknowledge acceptance thereof."

Blakey testified that he asked petitioner to acknowledge acceptance of his November 27, 1989 resignation letter ("Blakey's resignation letter")

"Because I thought it would be a necessary formality".

Blakey changed his mind about resigning eight days later, and purportedly withdrew his resignation on December 5, 1989 ("Blakey's withdrawal"). However, no resolution of the board of directors of DRX was ever moved or passed, either to re-elect Blakey as a director, or to approve Blakey's withdrawal.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

ARGUMENT

I.

THE THIRD CIRCUIT INCORRECTLY AFFIRMED THE DISTRICT COURT DECISIONS PURSUANT TO CHAPTER 6 OF THIRD CIRCUIT IOP'S

The Third Circuit affirmed the District Court decision by judgment order, pursuant to Chapter 6 of the Third Circuit IOP's.

Subsection 6.2.2 of Chapter 6 lists criteria when a judgment order may be used. Those pertinent to this case are:

(i) when the judgment of the District Court is based on findings of facts which are not clearly erroneous;

(ii) when no error of law appears;

(iii) when the District Court did not abuse its discretion on matters addressed thereto.

Petitioner now shows that the Third Circuit incorrectly affirmed the District Court decisions by judgment order because the District Court: made clearly erroneous findings of fact; erred at law; and abused its discretion.

A. Findings of Fact

In Anderson v. Bessemer City, 470 U.S. 564, 575, 84 L Ed 2d, 518, 529, the Court held that:

> This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into a decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story...[w]here such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination."

In the instant action, the district court did attempt to insulate its findings from review by denominating them credibility determinations: the District Court's February 1, 1991 Memorandum Opinion ("District Court judgment") sets out its

factual findings and the basis on which those findings were determined. The District Court judgment reveals its overwhelming reliance on assessments of trial witness credibility in making its factual findings.

The District Court judgment further reveals that it failed to credit documentary and other objective evidence which clearly contradicted the witness testimony that it erroneously relied on.

That evidence included the Brown memorandum, the Nichol deposition, FennoScandia's post-trial brief, and FennoScandia's internal memorandum.

FennoScandia's trial witnesses denied its intention not to renew the Alexandra Mining loan beyond June 30, 1989, had been disclosed, but the Brown memorandum directly contradicted that

testimony, and the Nichol deposition further contradicted that testimony.

Hinks denied at trial that there had ever been any agreement between him and FennoScandia, but FennoScandia's post-trial brief contradicted his testimony.

FennoScandia's internal memorandum contradicts the trial testimony of the FennoScandia witness regarding extension of the Alexandra Mining loan.

The District Court incorrectly constructed Blakey's resignation letter, which the Third Circuit had "untrammelled powers to interpret". See Emor, Inc. v. Cyprus Mines Corporation, 467 F.2d 770, 773 (3d. Cir. 1972).

The only tenable contruction of Blakey's resignation letter, in which he stated:

"I would ask you therefore to regard this letter as formal notice of such resignation and to acknowledge acceptance thereof"

makes it demonstrably clear that he was resigning, and there was no reasonable basis on which that statement could be regarded as equivocal, as the District Court held.

See Wiesmuller v. Interstate Fire & Cas. Co., 568 F.2d 40, 45-46 (7th Cir. 1978): "[r]easonable interpretation, and not one which leads to an absurd result" Id. at 45; "[m]erely being able to conjure up a remotely possible second interpretation is not sufficient to invoke ambiguity rule". Id. at 46.

Blakey testified that he considered his request - that petitioner acknowledge acceptance of his resignation - as simply

being a condition with which he, Blakey, (an Englishman not familiar with Delaware law regarding directors) had to comply.

Petitioner contends the District Court abused its discretion by its failure to credit evidence that clearly contradicted its credibility-determined factual findings.

In Goodman v. Lukens Steel Co., 777 F.2d 113, 128 (3d Cir. 1985), the Court stated that the Court of Appeals is not relieved of its responsibility to correct findings of fact when it is left (citing United States v. United States Gypsum Co, 333 U.S. 364, 395 (1948)) "[w]ith a definite and firm conviction that a mistake has been committed". See, also, Anderson, 470 U.S. at 528.

The Third Circuit misapprehended and misapplied the clearly-erroneous standard

and accordingly erred in affirming the District Court findings of fact.

B. Conclusions of Law

1. The Respondents' Proxy

In New England Anti-Vivisection Soc. v. U.S. Surgical, 889 F.2d 1198, (1st Cir. 1989) the Court held, at 1202-03:

> Federal Law is satisfied as long as proxy materials fully and fairly set forth the relevant and material facts from which a reasonable shareholder may draw his own conclusions as to how to vote.
>
> (Emphasis added)

Id, at 1203, goes on to state that an issue must be presented "[i]n all its vitality to the shareholders." (Emphasis added)

In TSC Industries, Inc. v. Northway, Inc., 428 U.S. 438, 448 (1976), this

Court confirmed "[t]he prophylactic purpose of the Rule [14a-9] and the fact that the content of the proxy statement is within management's control, it is appropriate that these doubts be resolved in favor of those the statute is designed to protect." (Emphasis added)

The District Court judgment (Appendix A) concluded "[t]hat the Proxy Statement and accompanying fight letter were sufficient to put any reasonable investor on notice as to Clarke's allegations." (Emphasis added)

The District Court misread Rule 14a-9, and the legal authority thereon, by concluding that Rule 14a-9 is satisfied simply by putting investors "on notice" of a material fact.

The Third Circuit's affirmation of the District Court judgment regarding

Rule 14a-9(a) conflicts with the decision of the First Circuit and with a decision by this Court. New England Anti-Vivisection, 889 F.2d at 1202-03; TSC Industries, 428 U.S. at 448.

2. The Blakey Resignation

8 Del. C., section 141(b) ("section 141") provides in pertinent part that: "[A]ny director may resign at any time upon written notice to the corporation".

In Dillon v. Berg, 326 F.Supp 1214, 1223-24 (D. Del. 1971), it was held that the logical interpretation of section 141 is that acceptance is no longer essential to effect a valid resignation by a director.

Id., at 1223, held that "[t]he legislative history of the phrase, 'Any director may resign at any time upon written notice to the corporation,'

indicated that the purpose of this provision was to prevent a corporate director who desired to resign from having his status placed in doubt by a refusal or failure of the board to act."

Thus, arguendo, even if Blakey did condition his resignation letter on its acceptance by petitioner, petitioner had no legal right to accept or reject it.

II.

THE PETITION MEETS THIS COURT'S CRITERIA FOR GRANT OF PETITION FOR WRIT OF CERTIORARI

Supreme Court Rule 10.1. indicates the character of reasons that will be considered by the Court for grant of a petition for writ of certiorari, and this petition meets those criteria because:

1. The Third Circuit affirmed the District Court judgment regarding Rule

14a-9(a) in conflict with the decision of another United States Court of Appeal.

2. The Third Circuit has so far departed from the accepted and usual course of judicial proceedings - by its failure to credit the evidence directly contradicting trial witness testimony, and by its failure to correct errors of law - as to call for an exercise of this Court's power of supervision.

III.

THIS CASE HAS THE PROFILE ENVISAGED BY A JUSTICE OF THE SUPREME COURT FOR COMPREHENSIVE REVIEW BY THE COURT OF APPEALS

In Anderson v. Bessemer City, 470 U.S. 564, 84 L Ed 2d 518, 533, Justice Powell, concurring with the Court's decision, stated in pertinent part:

"[I] write separately, however, because I am concerned that one may

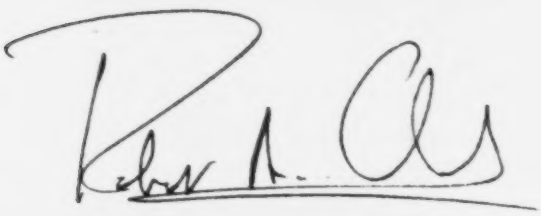
read the Court's opinion as implying criticism of the Court of Appeals for the very fact that it engaged in a comprehensive review of the entire record of this case. Such a reading may encourage overburdened Courts of Appeal simply to apply Rule 52(a) in a conclusory fashion, rather than to undertake the type of burdensome review that may be appropriate in some cases." (Emphasis added)

For reasons stated heretofore, this case has the profile of the type of case envisaged by Justice Powell as being appropriate for comprehensive review.

CONCLUSION

A writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,



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Pro Se Petitioner

This 9th day of July, 1992.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT A. CLARKE, Plaintiff	:	
v.	:	Civil Action No. 90-161-JJF
DRX, INC., HOWARD BUTCHER IV, GEORGE G. BLAKEY, RUDI P. FRONK, GEORGE J. HARTNETT, WARREN H. HINKS, JR., JAMES R. MARTIN, PAUL R. SUTTON, HENRY COLEN, JAMES MESSEGEE and FENNOSCANDIA BANK LIMITED, Defendants.	:	

ORDER

At Wilmington this 1st day of February, 1991, for the reasons set forth in the Memorandum Opinion issued this date,

IT IS HEREBY ORDERED that Judgment is entered for the Defendants.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT A. CLARKE, Plaintiff	:	
v.	:	Civil Action No. 90-161-JJF
DRX, INC., HOWARD BUTCHER IV, GEORGE G. BLAKEY, RUDI P. FRONK, GEORGE J. HARTNETT, WARREN H. HINKS, JR., JAMES R. MARTIN, PAUL R. SUTTON, HENRY COLEN, JAMES MESSEGEE and FENNOSCANDIA BANK LIMITED, Defendants.	:	

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Warren H. Hinks, Jr., Pro Se Defendant.

MEMORANDUM OPINION

February 1, 1991
Wilmington, Delaware

Joseph J. Farnan
FARNAN, District Judge

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, Robert A. Clarke ("Clarke"), a beneficial owner of DRX, Inc. ("DRX") common stock, was a director of DRX from 1987 until March 27, 1990, and served as Chairman of the Board, Chief Executive Officer and President from November 1987 until December 5, 1989. DRX is a Delaware corporation with

its principal place of business in Denver, Colorado. Through its subsidiaries, it engagaes in the business of exploring for gold and other precious metals. defendants Howard Butcher IV ("Butcher"),[1] George G. Blakey ("Blakey"), Rudi P. Fronk ("Fronk"),[2] George J. Hartnett ("Hartnett"),[3] and James R. Martin ("Martin")[4] were elected as Directors of DRX at a March 27, 1990 meeting of stockholders. Defendants Henry Colen ("Colen")[5], Warren H. Hinks, Jr. ("Hinks")[6] and James Messegee ("Messegee")[7] are former employees of DRX.

On November 17, 1987 Clarke became President, Chairman of the Board and Chief Operating Officer ("CEO") of DRX, Inc. In December 1987, DRX entered into a stock swap with Alexandra Mining Compnay

(Bermuda) Limited ("Alexandra Mining"), a company of which Clarke is the President and principal shareholder. Under the terms of the stock swap agreement, DRX purchased from Alexandra Mining 800,000 units of McFinley Red Lake Mines for 4,897,085 shares of DRX's common stock.

In June of 1987 Clarke and Peter Webster ("Webster")[8] negotiated a $5,000,000 (Canadian) loan on behalf of Alexandra Mining from defendant FennoScandia Bank Limited ("FennoScandia"),[9] which loan was to enable Alexandra Mining to acquire a stake in McFinley Red Lake Mines ("McFinley Mines"). As security, FennoScandia received a pledge of 4,897,085 shares of DRX stock,[10] a guarantee from Inverlussa Trust (a trust of which Clarke is the settlor), and a

limited personal guarantee from Clarke to FennScandia.

FennoScandia extended the loan several times. However, in a letter dated April 28, 1989 ("the non-renewal letter"), FennoScandia notified Clarke that it would not be extending the Alexandra Mining loan past the June 30, 1989 due date. Therefore, when Clarke eventually defaulted on the loan, the Alexandra Mining shares pledged as collateral were eventually transferred and registered in the name of FennoScandia Bank.

Clarke's claims stem from his allegations concerning the non-renewal of the Alexandra Mining loan by FennoScandia, and from actions that allegedly took place April 20 through 28, 1989 at meetings in London between

Webster, Allan Brown ("Brown"), a New Zealand mining engineer, and officials from FennoScandia. Clarke alleges that the avowed goal of the meetings was to oast him as President of DRX.

On December 5, 1989, the DRX Board of directors did vote, over Clarke's objection, to remove him as President, CEO, and Chairman of the Board.[11] At that meeting, defendant Hinks was elected acting President and remained in that position until February 1990, when defendant Fronk replaced him as President. Despite his ouster from his executive positions, Clarke remained a director of DRX until the March 27, 1990 meeting at which the management sponsored slate of proposed directors defeated a slate supported by Clarke.

On April 6, 1990, Clarke filed the instant Complaint, alleging violations of Sections 14(a) and 13(d) of the Federal Securities laws, and a violation of Del. Code Ann. tit. 8, Section 213 (Supp. 1988), which establishes limitations in determining the record date for an annual stockholders meeting. The Court placed this case on an expedited trial schedule because of concerns regarding DRX's financial stability, and conducted a bench trial in late December, 1990.

II. ALLEGATIONS

Specifically, Clarke contends that the defendants who were elected directors at the March 27, 1990 annual board meeting of DRX, Inc. have fraudulently omitted and misstated material facts in the management proxy statement issued in

connection with the March 27, 1990 shareholders meeting, in violation of Section 14(a) of the Securities Exchange Act of 1934 ("14(a)"), 15 U.S.C. Section 78n(a) (1988). In support of this claim, Clarke asserts that the management proxy material should have contained information regarding (1) the alleged FennoScandia conspiracy[12]; and (2) the resignation of George Blakey as a director of DRX, Inc.

Clarke also asserts that FennoScandia, Hinks, Messegee and Colen constituted a "group" under Section 13(d) of the Securities Exchange Act of 1934, and thus were required to file a Schedule 13D disclosure statement ("13D") pursuant to 15 U.S.C. Section 78m(d) (1988).

Clarke further claims that the March 27, 1990 shareholder meeting was invalid

first, because Blakey had resigned as a director, rendering his vote in setting the meeting invalid, and second, because there was no record date, the meeting was held in violation of Del. Code Ann. tit. 8, Section 213. Clarke seeks a declaration that the directors elected at the March 27, 1990 meeting were not validly elected, and thus a new election must be held, and an injunction prohibiting the directors from acting on behalf of DRX in the interim.

Defendants respond first, that no conspiracy existed and that Blakey's purported resignation as a director of DRX was never effected. Defendants also contend that the proxy materials and the fight letter pertaining to the March 27, 1990 shareholders meeting contained sufficient reference to Clarke's

allegations of conspiracy, so that shareholders were put on notice.

Defendants further assert that no Schedule 13D disclosure was required because FennoScandia did not agree to act in concert with any entity to obtain shares of DRX, nor did Hinks, Messegee or Colen. As to the scheduling of the record date for the March 27, 1990 meeting, defendants assert that Del. Code Ann. tit. 8, Section 213 was not violated because plaintiff misreads the statute.

III. ISSUES

In an Order dated October 30, 1990, this Court set out the issues to be resolved by trial:

> The trial will resolve the issue of whether the present directors of DRX acquired and/or hold their office by acts of fraud

under the securities laws of the United States or common law fraud.

In resolving this issue, the parties intend to introduce evidence regarding the following factual disputes:

a. The alleged conspiracy involving Fenno[S]candia Bank Limited, and others;

b. The alleged secret agreements and other matters concerning the election, resignation and replacement of George G. Blakey as a director of DRX;

c. The alleged actions of various stockholders to depress the price of DRX stock in order to affect plaintiff's holdings and position.

> The legal issues...concerning the failure to set a record date at the meeting of the board of directors of DRX held on February 28, 1989, will be resolved at or following the trial....

IV. FINDINGS OF FACT

Both parties submitted pre-trial and post-trial briefs. The following are the Court's findings of fact.[13]

A. The Blakey Resignation

After reviewing George Blakey's resignation letter and listening to his testimony during trial, the Court finds that he did not intend for his resignation to be unequivocal. The Court finds that Blakey conditioned his resignation upon its acceptance by Clarke, then President of DRX. The Court

further finds that Clarke did not accept Blakey's resignation, as is evidenced by numerous letters and communications Clarke had with other Board members. Specifically, in a December 4, 1989 letter to the two other DRX Board members, Howard Butcher and George Hartnett, Clarke wrote:

> George Blakey has indicated his desire to retire from the board of DRX but I have not yet accepted his resignation, as I believe that tomorrow's board meeting is important and that he should attend, representing as he does the interests of a large number of shareholders in the U.K. George has agreed to defer his resignation and will

make a decision based on the outcome of the meeting.

DX-1 (emphasis added). The evidence at trial established that following Blakey's attempted resignation, Clarke continued to refer to Blakey as a director.[14] At trial Clarke repeatedly attempted to explain away these references to Blakey as a director by stating that he (Clarke) had continued to so refer to Blakey out of "habit."[15] The Court explicitly rejects Clarke's testimony on this issue, and finds that Clarke did not accept Blakey's resignation.

B. The Secret Director Plan

Plaintiff alleges that at a March 6, 1990 meeting in London, defendant Howard Butcher promised the British investors that Blakey would resign as a director of

DRX following DRX's next annual meeting, and that Blakey would be replaced by Ms. Emily McLoughlin, a representative of one of the British institutions. The Court finds that no "Secret Director Plan" was entered into, despite the March 8, 1990 facsimile letter from Jack Rice (of Third Mile Investment PLC, Great Britain) to Howard Butcher which stated in pertinent part:

> I have been asked by all the institutions..that you kindly confirm by fax the commitment you gave at the meeting, that our representative will be adopted to the board immediately following the AGM [Annual General Meeting]. I look forward to receiving this

confirmation as soon as possible please.

PX-11. It is undisputed that the British investors did indeed desire such a commitment. However, many persons present at the March 6, 1990 meeting, including Philip Slade of the British investment firm of Strauss Turnbull and Peter Clarke of the British investment firm Hill Samuel, testified that Butcher told Rice that no commitment could be given, but that if a vacancy on the DRX board arose, DRX would consider a representative of the British investors to fill the slot.[16] In his deposition, Rice stated that the March 8, 1990 facsimile letter was, in effect, a bargaining ploy in an attempt to force Butcher to give the British investors the

commitment they wanted. Rice depo. at 4. Based on the above mentioned testimony which the Court credits as truthful, the Court finds that Butcher did not give any commitment to Rice, but simply stated that the DRX directors would consider a representative of the British institutions to fill a vacancy on the DRX board if one arose.

C. The "FennoScandia Conspiracy"

1. The Alleged Verbal Extension of the Alexandra Mining Loan.

Clarke's claims ultimately stem from a March 17, 1989 meeting Clarke had with David Hugh Adamson ("Adamson"), Executive Director of FennoScandia Bank, in which Clarke claims that Adamson verbally agreed to an extension of the loan that FennoScandia Bank had earlier negotiated with him for Alexandra Mining. On this

issue, the Court finds that no such extension was granted by FennoScandia Bank. Specifically, Clarke failed to produce any evidence at trial to prove that Adamson gave Clarke an oral extension, other than Clarke's own testimony, which the Court rejects. See Tr. I at 77; II at 420.

2. The London Meetings with Brown and Webster.

It is undisputed that during the week of April 20 through 28, 1989, at the behest of defendant Warren Hinks, FennoScandia officials met with Allan Brown, a New Zealand mining engineer and consultant, and Peter Webster, a disgruntled former director of Alexandra Mining, who was fired by Clarke in December, 1988. The record shows that Hinks hired Brown as a consultant to look

into the possibility of ousting Clarke as President, Chairman of the Board, and Chief Executive Officer ("CEO") of DRX through the consent procedure provided for under Delaware law, Del. Code Ann, tit. 8, Section 228, and that Brown in turn hired Webster to accompany and assist him in this endeavor.

Contrary to Webster's testimony during trail, the Court finds that during the London meetings FennoScandia officials did not allow Webster or Brown to see any of the confidential loan documentation pertaining to the Alexandra Mining loan, including the April 28, 1989 letter in which FennoScandia informed Clarke that they would not renew the Alexandra Mining loan. This finding is primarily influenced by the Court finding that Webster is not a credible witness

because (1) Webster was hostile to Clarke (because Clarke had terminated him from Alexandra Mining), until Clarke gave Webster, who was at that time in a poor financial situation, a financial stake in the outcome of this litigation and paid him a substantial sum for his testimony; and (2) Webster claimed that he had seen the non-renewal letter but had not shown it to Hinks, the person who paid him (and Brown) to get just such information (regarding how to depose Clarke as President), which the Court finds untenable.

Further, Moreton G. Hall ("Hall"), an English Barrister employed as in-house counsel to FennoScandia Bank, who was present at the meetings in London with Brown and Webster during the week of April 20 through 28, 1989, testified at

trial that the Alexandra Mining loan documentation file and the non-renewal letter were not shown to Webster. Tr. IV at 944. The Court finds Hall to have been a highly credible witness, and his testimony was in direct conflict with Webster's testimony. Specifically, Hall testified, and the Court finds, that the non-renewal letter was not drafted until after Webster and Brown had left the bank's offices on April 28, 1989, and thus the letter could not have been shown to Webster at the April meeting. Tr. IV at 935.

3. The Brown/Webster Plan.

The Court finds that the plan proposed to FennoScandia Bank by Brown and Webster ("the Brown/Webster Plan") at the behest of Hinks, was a plan to oust Clarke using the "consent" procedure

under Del. Code Ann. tit. 8, Section 228. The Court finds that FennoScandia rejected this plan, and did not agree to act in concert with Brown, Webster or Hinks in any manner with regard to Clarke. The Court further finds that the "consent" procedure was never implemented to oust Clarke, Tr. V at 1081, and that Clarke was ousted for cause by the directors of DRX, who never discussed the matter with FennoScandia. Tr. IV at 888; III at 579.

4. Non-Renewal of the Alexandra Mining Loan

The Court rejects plaintiff's contentions that FennoScandia entered into an implicit agreement with Brown, Webster and Hinks to oust Clarke.

The Court finds that after FennoScandia decided not to extend the

Alexandra Mining loan, and gave Clarke notice of this decision, FennoScandia pursued a plan to get repayment of the loan. See Tr. V at 1088. Specifically, after FennoScandia sent Clarke the April 28, 1989 non-renewal letter, in response to a request from Clarke, FennoScandia agreed to put the loan on a demand basis, as long as Clarke paid all interest due as of June 30, 1989, and continued to pay the interest monthly in advance. Tr. V. at 1089. Clarke later decided not to sign the agreement. Tr. IV at 992. Additionally, in a letter dated October 11, 1989, FennoScandia offered to sell the Alexandra Mining loan to Clarke for $900,000 (U.S.), approximately 25% of the total amount due under the loan, which proposal would have transferred the disputed DRX shares back to Clarke once

the $900,000 was paid, and removed Clarke from his personal guaranty of the Alexandra Mining loan. Tr. IV at 994-95. Clarke rejected this proposal as well. Id. at 995.

5. Henry Colen's and James Messegee's Alleged Conspiracy with FennoScandia Bank.

As a preliminary matter, the Court notes that the issue of whether Henry Colen and James Messegee depressed or attempted to depress the price of DRX stock is an issue that is before the Court, contrary to plaintiff's assertion to the contrary. See Order (October 30, 1990) (C.A. 90-161-JJF).

With regard to this issue, the Court finds that Colen and Messegee did not depress or attempt to depress the price of DRX stock. Clarke failed to submit any

evidence to support such an assertion, other than his own testimony, and PX-21, a memorandum dated October 31, 1989 from Randy Martin to Clarke, in which Martin asserts that Colen was attemting to manipulate the price of DRX stock.[17] The Court accepts Colen's testimony, and finds that he did not encourage anyone to sell their DRX shares, Tr. IV at 665-66, particularly because it is against logic that a man of modest means would want to lower the value of one of his major assets. When Micromin was merged into DRX, the 200,000 shares Colen received from the merger were worth approximately $300,000.00 ($1.50/share). At the time of trial, the same shares were worth approximately $0.10/share.

The Court finds Colen to have been a credible witness at trial. The Court

finds that while Colen submitted a proposal to FennoScandia Bank ("the Colen proposal") in order to enlist FennoScandia's assistance, FennoScandia never entered into any agreement with Colen. The Court finds, as Adamson testified, that the Colen proposal was placed into a file and never considered by FennoScandia. Tr. IV at 990. The Court finds, as Colen testified, that far from being part of any conspiracy to oust Clarke, Colen actually voted against two of the candidates for election to director on the management slate at the March 27, 1990 annual meeting. Tr. III at 678. In sum, the Court finds that Colen never entered into any agreement to oust Clarke as President of DRX. Tr. III at 671, 675, 676, 677.

As to James Messegee, the Court finds that Messegee never entered into any agreements with FennoScandia or any other person or group to oust Clarke as a director of DRX. The Court finds, as Messegee testified, that while Messegee met with Hinks and Brown to discuss the financial mismanagement of DRX and Brown's upcoming trip to London to meet with FennoScandia, Messegee never knew that Brown or Hinks had a plan to oust Clarke. Tr. III at 781. The Court finds Messegee to have been a credible witness at trial, and accepts his testimony on this matter as true. See e.g., Tr. III at 703, 704; IV at 778-787.

D. The Webster Statement and Affidavit

On March 10, 1990, Peter Webster signed a statement regarding his recollection of the meetings he and Brown

had with FennoScandia Bank officials in London from April 20 through 28, 1989 (PX-20). On March 14, 1990, Webster also signed an affidavit concerning, among other things, his recollection of the London meetings (PX-8). In its post-trial ruling on admissibility of evidence, the Court overruled defendants' objection to these exhibits based on hearsay grounds, because they were not being admitted for their truth. See Memorandum Opinion and Order (February 1, 1991) (C.A. 90-161-JJF). As stated previously, the Court does not find Webster to be a credible witness, and therefore rejects his testimony on these issues in its entirety.

V. CONCLUSIONS OF LAW

A. The Blakey Resignation

Under Delaware law, the acceptance of a resignation is not absolutely required for it to be effective. See Del. Code Ann. tit. 8, Section 141(b) (1983) ("Section 141"). The statute reads:

> Each director shall hold office until his successor is elected and qualified or until his earlier resignation or removal. Any director may resign at anytime upon written notice to the corporation.

Id. In Dillon v. Berg, 326 F.Supp. 1214, 1223-24 (D.Del. 1971), aff'd 453 F.2d 876 (3d Cir. 1971), the Court held that an effective resignation under Section 141 requires that it be (1) unequivocal; (2) in writing; and (3) submitted to an agent of the Corporation. The Court stated that "[t]he necessity for written notice to

the corporation before a director's resignation becomes effective clearly indicates an intent to outlaw secret, covert resignations in order to enable the other directors to know at all times the status of their fellow directors." Id. (emphasis added).

In interpreting Del. Code Ann. tit. 8, Section 141(b), the Court stated that the purpose of the legislative provision was "to prevent a corporate director who desired to resign from having his status placed in doubt by a refusal or failure of the Board to act." Dillon, 326 F.Supp. at 1223. The Court went on to state that the "logical interpretation of the provision is that acceptance is no longer essential to effect a valid resignation by a director." Id. at 1224 (emphasis added). While acceptance is no longer

"essential" to effectuate a resignation, the Court concludes that a director may make acceptance a condition of his resignation. The Court in Dillon addressed this issue by requiring that a resignation be "unequivocal" in order to be effective.

Folk on the Delaware General Corporation law states that whether a director has resigned "is a question of fact to be determined from the circumstances of each case." Section 141.5.2. (1990). In addition, in Lasher v. Inter-Continental Biologics, Inc., No. 950 (Del. Ch. June 14, 1984), Chancellor Brown stated:

> "[L]oose and ambiguous language will not be regarded as sufficient to prove the resignation of a corporate

officer, at least where the subsequent acts and declarations of the officer are inconsistent with any such contention."

Slip Op. at 20 (citing 2 Fletcher, Cyclopedia of the Law of Private Corporations (Permanent ed. 1990) Section 350.

Thus, the resignation issue in this case turns on whether Blakey was unequivocal when he wrote "I would ask you therefore to regard this letter as formal notice of such resignation and to acknowledge acceptance thereof." PX-1. Considering all the facts relevant to Blakey's purported resignation, the Court concludes that Blakey's resignation letter was equivocal and that Blakey intended to condition his resignation

upon its acceptance by Clarke. Clarke never accepted Blakey's resignation, and therefore Blakey's effort to resign was never effected. Since his resignation was never valid, Blakey was a director of DRX for purposes of all DRX Board meetings since his election to the DRX Board, including the February 28, 1990 DRX Board meeting at which the annual meeting date was postponed.

B. The FennoScandia Conspiracy

In Connolly v. Labowitz, the Superior Court of Delaware, in and for New Castle County stated:

> Civil conspiracy is the combination of two or more persons or entities for an unlawful purpose or for the accomplishment of a lawful purpose by unlawful means,

> resulting in damage. Civil conspiracy is not an independent cause of action in Delaware.

519 A.2d 138, 143 (Del.Super. Ct. 1986) (citations omitted).

As a preliminary matter, the Court concludes that Brown and Webster were agents of Hinks. The Court concludes that FennoScandia Bank never entered into a conspiracy with Hinks, or his agents, Webster and Brown, to remove Clarke as President of DRX. The Court concludes that FennoScandia never entered into any agreement with regard to the ouster of Clarke as President of DRX. The Court also concludes that the overtures from FennoScandia to Clarke following FennoScandia's decision not to renew the Alexandra Mining loan clearly indicate

that FennoScandia was pursuing a plan to work with Clarke to achieve repayment of the loan, not to oust Clarke, which is what Hinks and his agents were attempting to accomplish. The Court further concludes that while Hinks' goal -- the removal of Clarke as president of DRX -- might have coincided with FennoScandia's understandable preference that Clarke be replaced as President because the poor financial condition of DRX jeopardized their loan collateral, FennoScandia's actions after refusing to renew the Alexandra Mining loan were inconsistent with Hinks' goal. Specifically, the Court concludes that FennoScandia's objective was to achieve repayment of the loan, Tr. V at 1088, while Hinks' goal was to oust Clarke.

Further, since FennoScandia had loaned DRX $1,000,000 to keep it solvent, it is certainly understandable that FennoScandia would seek to have one of its representatives elected to the DRX board.

As to Colen and Messegee, the Court concludes, based on their respective testimony, that they did not conspire with any persons or entities to remove Clarke as President of DRX.

With regard to the alleged conspiracy between Hinks, Webster, and Brown, the Court concludes that no such conspiracy existed. Webster and Brown were merely agenst of Hinks, and FennoScandia made no agreement with them.

Thus, the Court concludes that FennoScandia, Colen, Messegee and Hinks did not enter into any conspiratorial

agreements with any person(s) or entity to remove Clarke as President of DRX.

C. Violations of Sections 14(a) and 13(d) of the Federal Securities Laws

1. Section 14(a).

Section 14(a) of the Securities Exchange Act of 1934 ("Section 14(a)") provides in pertinent part:

> It shall be unlawful for any person...in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other

> than an exempted security) registered pursuant to section [12] of this title.

15 U.S.C. Section 78n(a) (1988). In interpreting section 14(a), the United States Court of Appeals for the Third Circuit has stated:

> Its [14(a)'s] language dictates that as a prerequisite to recovery, a complainant initially must prove that his proxy was solicited in contravention of an SEC rule or regulation. In addition, he must prove injury. Finally, he must demonstrate a causal relationship between the violation of the rule or regulation and the injury.

Ash v. GAF Corp., 723 F.2d 1090, 1092-93 (3d Cir. 1983) (citations omitted).

To establish a violation of a Securities and Exchange Commission ("SEC") Rule, plaintiff relies on Rule 14(a)-9(a), which provides:

> No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necesary in order to make the statements

> therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

17 C.F.R. Section 240.14a-9(a) (1989).

In order to succeed on his claim under Section 14(a) and Rule 14a-9, plaintiff must show an omission or misstatement in the proxy statement, and that the omission or misstatement was material. See TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 444 (1976). "An omitted [or misrepresented] fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding

how to vote." TSC Industries, 426 U.S. at 449.

Plaintiff contends that the proxy statement issued by the DRX Board in connection with the March 27, 1990 shareholders meeting failed to disclose the conspiracy among FennoScandia, Hinks, Messegee and the DRX directors, and that this omission was material. The Court concludes that there was no material omission or missstatement on the proxy statement because there was no conspiracy.

Furthermore, the Court concludes that the Proxy Statement and accompanying fight letter were sufficient to put any reasonable investor on notice as to Clarke's allegations. The Proxy Statement pertaining to the March 27, 1990 annual

meeting of DRX shareholders contained the following language:

> FennoScandia Nominees Limited ("FennoScandia") received 4,722,085 of such shares (the "FennoScandia Shares") as a result of a default by Alexandra Mining Company (Bermuda) Limited ("AMC") on a loan to AMC (the "AMC Loan") from FennoScandia's affiliate, FennoScandia Bank Limited ... ("the Bank"). The AMC loan was secured by a pledge of the FennoScandia Shares pursuant to a Pledge Agreement with AMC. Following AMC's default, the Bank exercised its enforcement rights under the Pledge Agreement to permit

FennoScandia to become the registered holder of the FennoScandia shares. As the record holder, FennoScandia may exercise all voting rights attached to the FennoScandia shares until such time as the Bank can sell or otherwise dispose of the FennoScandia Shares. A trust of which Robert A. Clarke, a director of the Company who is not on the management slate of nominees for election at the Meeting, is the settlor is the controlling shareholder of AMC. Mr. Clarke had given a limited peraonal guaranty to the Bank as additional security for the AMC Loan.

PX-9, at p. 2 n.1.

The Proxy Statement further reads:

> In January 1990, Alexandra Clarke, the wife of Robert A. Clarke, instituted a stockholders' derivative suit against the Company [DRX] and FennoScandia Bank Limited (the "Bank"), seeking $40 million and alleging, among other things, that the Bank conspired with former employees of the Company to drive down the price of the Company's Common Stock so that Mr. Clarke was unable to secure substitute financing for the AMC [Alexandra Mining Company] loan. The AMC loan is personally guaranteed in part by Mr. Clarke and secured by

> 4,722,085 shares of the Company's Common Stock. See "Securities Ownership." The Board, other than Mr. Clarke, believes that there is no substantiation to such claims. The Bank plans to dismiss the suit on the grounds that Mrs. Clarke is not a proper representative of the stockholders.

PX-9, at p. 8.

Additionally, in a "fight letter" to DRX stockholders dated February 28, 1990, Butcher wrote:

> Clarke has contested the foreclosure, alleging, among other things, that disgruntled former employees have conspired and are conspiring with

FennoScandia to drive down the price of DRX shares in order to acquire control of DRX. Alexandra Mining instituted a suit against FennoScandia in London in December 1989... Shortly thereafter, all the directors of Alexandra Mining, other than Clarke, resigned from its board.

On numerous occasions over the past eight months, Clarke has urged the other DRX Board members to institute proceedings against FennoScandia. They have rejected Clarke's requests on the grounds that Alexandra Mining's dealings with FennoScandia are Alexandra's

> and Clarke's business, and unrelated to DRX. Further, the Board, other than Clarke, is aware of no evidence to indicate that FennoScandia has harmed DRX in any way.

PX-10, at p. 2.

Notwithstanding the Court's conclusion that there was no conspiracy, the Court concludes that these portions of the DRX defendants' proxy statement and fight letter more than adequately alerted any potential investor to Clarke's contentions with regard to the alleged conspiracy.

2. Section 13(d).

Under Section 13(d) of the Securities and Exchange Act of 1934, a "group" which directly or indirectly acquires the beneficial ownership of more

than 5% of the stock of a company must file a statement with the Securities and Exchange Commission. Title 15 U.S.C. Section 78(m)(d)(1) (1988). Under this section, when a "group" as defined in the statute agrees to act in concert to acquire shares, it must so disclose. See Bath Indus., Inc. v. Blot, 427 F.2d 97, 102 (7th Cir. 1970). The Court concludes that since FennoScandia, Hinks, Messegee, and Colen did not act in concert to acquire the shares of DRX, section 13(d) is inapplicable and no 13(d) disclosure was required.

D. Del. Code Ann. tit. 8, Section 213

On January 20, 1990, the Board selected March 6, 1990 as the date of the Annual Meeting, and February 14, 1990 as the Record Date. On February 28, 1990, the Board adopted a resolution postponing

the Annual Meeting until March 27, 1990, but did not set a new record date.

Del. Code Ann. tit. 8, Section 213 (Supp. 1988) states in pertinent part:

> In order that the corporation may determine the stockholders entitled to notice of or to vote at any meeting of stockholders or any adjournment thereof, the board of directors may fix a record date, which record date shall not precede the date upon which the resolution fixing the record date is adopted by the board of directors, and which record date shall not be more than 60 nor less than 10 days before the date of such meeting. If no record date is fixed by the

> board of directors, the record date for determining stockholders entitled to notice of or to vote...shall be at the close of business on the day next preceeding the day on which notice is given...A determination of stockholders of record entitled to notice of or to vote...shall apply to any adjournment of the meeting, provided, however, that the board of directors may fix a new record date for the adjourned meeting.

Thus, the two limitations in fixing a record date are (1) that the record date cannot precede the date on which it was fixed by the board, and (2) that the

record date cannot be more than 60 nor less than 10 days before the date of the annual meeting. Neither occurred here. First, the record date was February 14, 1990. The DRX Board fixed that record date on January 24, 1990 and never moved it. Second, since the record date was February 14, 1990 and the meeting date was March 27, 1990, no violation occurred.

Clarke contends that the record date for the originally scheduled meeting cannot automatically be the record date for the rescheduled meeting, if when the board of directors rescheduled the annual meeting they were silent as to the record date. In essence, plaintiff claims that because the February 14, 1990 record date preceeded the rescheduling of the Annual

Meeting on February 28, the rescheduling of the Annual meeting was invalid.

The Court rejects this interpretation. Plaintiff attempts to read in a third restriction, the the record date cannot precede the date on which the board sets the meeting date. No such restriction exists. Thus, the Court concludes that the record date was validly set under Del. Code Ann. tit, 8, Section 213.

Footnotes:

1. Butcher has been Chairman of the Board and Chief Executive Officer of DRX since December 1989, and was Vice-Chairman from November 1987 until December 1989.

2. Fronk has been President of DRX since February 1990 and Cheif Financial Officer since August 1989.

3. Hartnett has been Secretary of DRX since December 1989.

4. Martin has been executive Vice-President of DRX since February 1990, and Chief Operating Officer since August 1989.

5. Colen founded Micronesian Mineral Resource Company Limited ("MicroMin") in 1986, which merged with DRX in March, 1989. After the merger, Colen became President of the DRX Micromin subsidiary, and was fired from this position by Clarke one month later, in April of 1989. Colen received 200,000 shares of DRX in the merger, which shares he sold in the fall of 1990.

6. Hinks was President and co-founder of Westland Minerals Exploration Company ("Westland"), and became an officer of DRX's Westland subsidiary after it merged with DRX in 1988. Hinks served as acting President of DRX from December 1989 until February 1990, and is currently President Emeritus of DRX, as well as a shareholder.

7. Messegee is a former Vice-President of Westland, who became an employee of DRX on May 13, 1988 when Westland merged with DRX. Messegee was fired by Clarke on June 5, 1989.

8. Webster was a director of Alexandra Mining from April, 1987 until December, 1988.

9. Defendant Paul R. Sutton ("Sutton") is an Executive Director, Credit Controller and Compliance Officer of defendant FennoScandia Bank Limited.

10. The initial security for the Alexandra Mining loan was for all the shares and warrants obtained from McFinley Mines. However on January 7, 1988, after McFinley Mines was subsequently merged into DRX, FennoScandia agreed to a substitution of the initial 800,000 shares and 800,000 warrants in McFinley Mines for 4,897,085 shares of DRX, Inc.

11. Thoughout the remainder of this Opinion, when referring to Clarke's ouster as President, Chairman of the Board and CEO, the Court will simply

refer to it as Clarke's "ouster as President."

12. Clarke alleges that the directors of DRX conspired with FennOScandia to oust Clarke as President of DRX.

13. In arriving at its Findings of Fact, the Court took into consideration the credibility of witnesses, rejecting certain testimony as not credible where noted.

14. See e.g., DX19,20,21,23,26,27,29,30,31,33,37,38,39 and 47.

15. See e.g., Transcript ["Trans."] I at 166, 172, 175, 178 and 180.

16. See e.g., Peter Clarke deposition ("depo.") at 17; Rice depo. at 4; Fronk

depo. at 170-71; Slade depo. at 7-8; Butcher depo. at 146-47.

17. At trial, Fronk testified that the contents of PX-21 were dictated "word-for-word" by Clarke. Trans. IV at 847-48.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT A. CLARKE, Plaintiff	:	
v.	:	Civil Action No. 90-161-JJF
DRX, INC., HOWARD BUTCHER IV, GEORGE G. BLAKEY, RUDI P. FRONK, GEORGE J. HARTNETT, WARREN H. HINKS, JR., JAMES R. MARTIN, PAUL R. SUTTON, HENRY COLEN, JAMES MESSEGEE and FENNOSCANDIA BANK LIMITED, Defendants.	:	

MEMORANDUM AND ORDER

Trial in the above-captioned case commenced in late December, 1990. The Court reserved all rulings on the admissibility of evidence for post-trial decision. Following the conclusion of the trial, the parties submitted their objections to exhibits. The issue of admissibility of the objected to evidence

is now before the Court for rulings. All evidence not objected to by any party is admitted. As to these exhibits, the Court concludes as follows:

As to PX-5 (June 9, 1989 memorandum from Rudi P. Fronk to the DRX, Inc. Board), PX-7 (October 31, 1989 letter from Robert A. Clarke to Jan Ankarcrona), PX-11 (March 9, 1990 facsimile from Jack Rice to Howard Butcher), PX-14 (March 1, 1989 letter from Howard Butcher to Sedate, Inc.), PX-21 (October 31, 1989 memorandum from Randy Martin to Robert A. Clarke), PX-24 (FennoScandia file note regarding the Alexandra Mining loan), PX-62 (NASDAQ Monthly Reports for DRX, Inc. stock from October, 1988 through February, 1990), and PX-69 (phone records of Peter Webster), the hearsay objections are overruled.

As to PX-8 (affidavit of Peter Webster), PX-20 (statement of Peter Webster), and PX-26 (affidavit of Sally Ann Nicholson), the hearsay objections are overruled because the exhibits are not being admitted for the truth of the matter asserted.

As to FennoScandia Bank's objection to certain portions of the deposition testimony of Laurence Howard Nichol ("Nichol") because of hearsay and lack of foundation, the objections are overruled.

IT IS HEREBY ORDERED that:

1. With regard to exhibits numbered PX-5, PX-7, PX-11, PX-14, PX-21, PX-24, PX-62, and PX-69, defendants' objections are overruled and the exhibits are admitted.

2. With regard to exhibits numbered PX-8, PX-20, and PX-26,

defendants' objections are overruled and the exhibits are admitted, but not for the truth of the matter asserted.

JOSEPH J. FARNAN, JR.
UNITED STATES DISCTIRCT JUDGE

February 1, 1991

APPENDIX C.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT A. CLARKE,	:	
	:	
Plaintiff	:	
	:	
v.	:	Civil Action No.
	:	90-161-JJF
DRX, INC., HOWARD BUTCHER IV, GEORGE G. BLAKEY, RUDI P. FRONK, GEORGE J. HARTNETT, WARREN H. HINKS, JR., JAMES R. MARTIN, PAUL R. SUTTON, HENRY COLEN, JAMES MESSEGEE and FENNOSCANDIA BANK LIMITED,	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

On December 10, 1990, defendants FennoScandia Bank Limited ("FennoScandia") and Paul R. Sutton ("Sutton") filed a motion pursuant to Fed. R. Civ. P. 37 in the United States District Court for the District of Delaware, "for an order prohibiting

plaintiff from introducing evidence on the issue of whether Robert A. Clarke ("Clarke" or "plaintiff") and FennoScandia entered into an oral agreement to modify the written loan agreement between FennoScandia and Alexandra Mining Company ["Alexandra Mining"] to extend the term of a loan from FennoScandia to [Alexandra Mining Company] beyond June 30, 1989." Alexandra Mining Company ("Alexandra Mining") is a Bermuda Corporation controlled and solely owned by plaintiff, Robert A. Clarke ("Clarke"). Clarke is a former director, President, Chairman of the Board, and Chief Executive Officer ("CEO") of defendant DRX, Inc. ("DRX"). On behalf of Alexandra Mining, in June of 1987 Clarke negotiated a $4.7 million (Canadian) loan from defendant FennoScandia Bank Limited

("FennoScandia"). The loan was ultimately secured by approximately 30% of the outstanding common stock of DRX, after the initial collateral (shares in McFinley Red Lake Mines) was exchanged for shares in DRX, with FennoScandia's permission. Following two extensions granted by FennoScandia, the loan was due on June 30, 1989.

FennoScandia requested that plaintiff produce all Alexandra Mining Board minutes or drafts of minutes from 1988 to the present. In November, 1990, plaintiff's counsel certified to the Court that all responsive documents within the possession, custody and control of the plaintiff or the entities with which he is affiliated had been produced, however it now appears that only some Alexandra Mining minutes had

been produced. Counsel for FennoScandia advised plaintiff's counsel on a few occasions that production was incomplete. On November 28, 1990, during a discovery conference, plaintiff's counsel notified FennoScandia that additional Alexandra Mining Board minutes existed, but had not been produced because plaintiff was unable to obtain them from his Bermudian counsel, due to non-payment of their legal fees.

I. ISSUE

As a factual matter underlying his legal claims, plaintiff claims that on March 17, 1989, David Hugh Adamson ("Adamson"), Executive Director of FennoScandia Bank, verbally agreed to an extension of the Alexandra Mining loan past the June 30, 1989 due date. Plaintiff's evidence regarding the

alleged oral extension apparently consists solely of his own testimony on this matter.

Defendants assert that the Alexandra Mining Board minutes, if silent with respect to any alleged verbal extension, would impeach Clarke's claim that there was a verbal extension. Defendants claim that "[p]laintiff's failure to produce the [Alexandra Mining] documents is inconsistent with the representations of his counsel that all documents subpoenaed from [Alexandra Mining] have been produced, and his failure to timely inform FennoScandia that such documents had not been produced has prejudiced the defendants by withholding crucial evidence and by failing to inform defendants of this withholding in time

sufficient for defendant to obtain the documents through compulsory process."

II. DISCUSSION

Federal Rule of Civil Procedure 37(b)(2) provides:

> If a party...fails to obey an order to provide or permit discovery..., the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> .....
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defences, or prohibiting that party from introducing designated matters into evidence.

The Court concludes that even if plaintiff was unable to produce the Alexandra Mining documents because they are in the possession of his Bermudian counsel who refues to relinquish them due to non-payment of legal fees, Clarke nonetheless had a duty to disclose the existence of such documents to FennoScandia, especially in light of the fact that FennoScandia explicitly asked for such documents by name. Litigants have a duty of candor during discovery, and during all stages of trial, which duty Clarke breached. The Court concludes that FennoScandia was indeed prejudiced by Clarke notifying them at the "eleventh hour," one week before trial was to begin, leaving defendants with insufficient time to obtain the documents through compulsory process.

IT IS HEREBY ORDERED that:

1. Defendants' Motion for Order Precluding Plaintiff from Supporting a Claim is GRANTED.

2. Defendants' application for fees and expenses is DENIED.

JOSPEH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE

February 1, 1991

APPENDIX D.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT A. CLARKE, Plaintiff	:	
v.	:	Civil Action No. 90-161-JJF
DRX, INC., HOWARD BUTCHER IV, GEORGE G. BLAKEY, RUDI P. FRONK, GEORGE J. HARTNETT, WARREN H. HINKS, JR., JAMES R. MARTIN, PAUL R. SUTTON, JAMES MESSEGEE and FENNOSCANDIA BANK LIMITED, Defendants.	:	

ORDER

At Wilmington this 12th day of June, 1991, for the reasons set forth in the Memorandum Opinion issued on this date,

IT IS ORDERED that:

1. Plaintiff Robert A. Clarke's ("Clarke") Motion for Reconsideration is DENIED.

2. Plaintiff Clarke's Motion for an Extension of Time in Which to File an Appeal is GRANTED. Clarke shall have ten (10) days from the entry of this Order to notice his appeal of the February 1, 1991 Order and Judgment.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT A. CLARKE, Plaintiff	:	
v.	:	Civil Action No. 90-161-JJF
DRX, INC., HOWARD BUTCHER IV, GEORGE G. BLAKEY, RUDI P. FRONK, GEORGE J. HARTNETT, WARREN H. HINKS, JR., JAMES R. MARTIN, PAUL R. SUTTON, JAMES MESSEGEE and FENNOSCANDIA BANK LIMITED, Defendants.	:	

Robert A. Clarke, Pro Se Plaintiff.

Stephen E. Jenkins, Esquire, of ASHBY, McKELVIE & GEDDES, Wilmington, Delaware. Attorney for Defendants DRX, Butcher, Blakey, Fronk, Hartnett and Martin.

James E. Nesland, Esquire, William J. Leone, Esquire, and Leslie J. Kramer, Esquire, of IRELAND STAPLETON PRYOR & PASCOE, Denver, Colorado. Thomas C. Grimm, Esquire, of MORRIS NICHOLS ARSHT & TUNNELL, Wilmington, Delaware. Attorney for Defendants Sutton and FennoScandia.

Stephen D. Goldberg, Esquire, of THEISEN LANK, MULFORD & GOLDBERG, Wilmington,

Delaware. Attorney for Defendant Messegee.

Warren H. Hinks, Jr., Pro Se Defendant.

MEMORANDUM OPINION

June 12, 1991

Wilmington, Delaware

FARNAN, District Judge.

Following a bench trial in the above matter, the Court issued a Memorandum Opinion and an Order on February 1, 1991, ruling in favor of all defendants on all claims raised by plaintiff, Robert A. Clarke ("Clarke").[1] On February 11, 1991, plaintiff, having dismissed his counsel and appearing pro se, requested an extension of time in which to file his Motion for Reconsideration. By Order dated February 13, 1991, this Court granted the requested extension. (D.I.

126). On February 21, 1991, Plaintiff filed a Motion for Reconsideration (D.I. 127), and on February 28, 1991, plaintiff filed a Motion to Extend Time in Which to Appeal (D.I. 129), which motions are presently before the Court.

I. ISSUES

Plaintiff raises the following contentions with his Motion for Reconsideration. First, plaintiff contends FennoScandia Bank Limited ("FennoScandia Bank") officials Moreton G. Hall ("Hall") and Hugh David Adamson ("Adamson") were not credible witnesses whose testimony at trial -- that FennoScandia Bank officials did not disclose confidential loan information regarding the non-renewal of the loan to Alexandra Mining Company (Bermuda)

Limited ("Alexandra Mining") -- should not have been accepted by the Court.

Plaintiff suggests that the Court should now re-examine and accept the testimony of Peter Webster ("Webster"), a former director of Alexandra Mining, whose testimony at trial the Court explicitly rejected as being untrustworthy.

Plaintiff additionally requests that the Court re-examine its findings (1) that Adamson did not agree verbally to an extension of the Alexandra Mining loan; (2) that FennoScandia Bank did not agree to act in concert with Allan Brown ("Brown"), Webster, or defendant Warren Hinks ("Hinks") in any manner with respect to Clarke; (3) that defendant James Messegee ("Messegee") did not enter into any conspiracy with FennoScandia

Bank or any other person or group to oust Clarke as President, Chairman of the Board, and Chief Operating Officer ("CEO") of defendant DRX, Inc. ("DRX"); (4) that defendant Howard Butcher IV ("Butcher") did not promise the British investors that when defendant George Blakey ("Blakey") resigned as a director, the open director slot would be filled by Ms. Emily McLoughlin, a representative of the British institutions; and (5) that there was no material omission or misstatement in the DRX proxy statement because there was no conspiracy.

Plaintiff requests that the Court make a finding (1) that defendant Henry Colen ("Colen"), while he was not part of plaintiff's alleged FennoScandia conspiracy, that Colen knew of the non-renewal of the Alexandra Mining loan, and

transmitted this information to others; (2) that defendants George Hartnett ("Hartnett"), Butcher, Blakey, and Rudi P. Fronk ("Fronk") were willfully and fraudulently reckless in not informing DRX stockholders of the allegation contained in the Webster affidavit; and (3) that Clarke was unfairly dismissed as President, Chairman of the Board and CEO of DRX.

In addition, Clarke requests that the Court reconsider its decision to grant FennoScandia's Motion to Preclude Plaintiff from Introducing Evidence in connection with Adamson's alleged verbal extension of the Alexandra Mining loan, and now deny FennoScandia's motion.

II. DISCUSSION

A. Motion for Reconsideration

The purpose of a motion for reconsideration is to present newly discovered evidence, or to correct manifest errors of law or fact. Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985) (citation omitted). The moving party may not submit evidence which was not newly discovered in support of the motion for reconsideration. Id. (Citation omitted).

After a careful review of Clarke's motion, the Court finds that Clarke has submitted no new evidence and concludes that Clarke is attempting to relitigate the issues of this case by arguing "new" facts that were available, but not offered for admission at trial. See Harsco, 779 F.2d at 909. Further, the Court concludes that all of the issues raised by plaintiff in the present motion

were either raised at trial, and decided adversely to plaintiff, or could have been raised at trial. The Court finds no error in the findings of fact, nor in the conclusions of law, which plaintiff contests.

For these reasons, the matters raised by Clarke are untimely and the Court must deny the Motion to Reconsider. An appropriate Order will be entered.

B. **Motion To Extend Time In Which To Appeal**

Clarke requested an extension of time in which to file an appeal in a February 27, 1991 letter to the Court. Clarke then filed the motion to extend time on February 28, 1991 pursuant to Fed.R.App.P. 4(a)(5). Rule 4(a) states in pertinent part:

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from.

. . .

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the Court

otherwise requires....No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

Clarke contends that excusable neglect under Rule 4(a)(5) has been demonstrated because he is not an attorney, and was required to handle all post-trial motions pro se. Further, Clarke asserts that he relied on the Order of the Court dated February 13, 1991, granting plaintiff's request for an

extension of time in which to file his Motion for Reconsideration.

In consideration of the fact that Clarke is unrepresented by counsel, and the Court was possibly mistaken in granting him an extension of time in which to file his Motion for Reconsideration, the Court will grant Clarke's request for an extension of time in which to file his appeal.

Clarke will have ten (10) days from the date of entry of the Order issued in conjunction with this Memorandum Opinion to notice his appeal of the February 1, 1991 Order and Judgement.

Footnote

1. For a full discussion of the facts of this case, see the Memorandum Opinion issued on February 1, 1991.

APPENDIX E.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-3411

Robert A. Clarke,
Appellant

v.

DRX, INC.; HOWARD BUTCHER, IV; GEORGE G. BLAKEY; RUDI P. FRONK; GEORGE G. HARTNETT; WARREN H. HINKS, JR.; JAMES R. MARTIN; PAUL R. SUTTON; JAMES MESSEGEE; HENRY COLEN; FENNOSCANDIA BANK LIMITED

Appeal from the United States District Court for the District of Delaware
(D.C. Civil Action No. 90-00161)

District Judge: Honorable Joseph J. Farnan, Jr.

Submitted Under Third Circuit Rule 12(6)
March 12, 1992

PRESENT: HUTCHINSON, ALITO and ROTH,
Circuit Judges

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs shall be taxed against appellant.

By the Court,

William D. Hutchinson
Circuit Judge

ATTEST:

Sally Mrvos
Clerk

DATED: March 23, 1992

APPENDIX F.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-3411

Robert A. Clarke,
Appellant

v.

DRX, INC.; HOWARD BUTCHER, IV; GEORGE G. BLAKEY; RUDI P. FRONK; GEORGE G. HARTNETT; WARREN H. HINKS, JR.; JAMES R. MARTIN; PAUL R. SUTTON; JAMES MESSEGEE; HENRY COLEN; FENNOSCANDIA BANK LIMITED

Appeal from the United States District Court for the District of Delaware
(D.C. Civil Action No. 90-00161)

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, Chief Judge,
BECKER, STAPLETON,
MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA,
COWEN, NYGAARD, ALITO
and ROTH, Circuit Judges

The petiton for rehearing filed by appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

William D. Hutchinson
Circuit Judge

DATED: April 16, 1992

APPENDIX G.

A. The Internal Operating Procedures ("IOP's") of the Third Circuit provides, at Chapter 6, subsections 6.1 and 6.2.

6.1 Panel Unanimity

"A case may be terminated in this court by a judgment order upon the unanimous decision of the panel."

6.2 Criteria

6.2.1 "A judgment order is filed when the panel unanimously determines to affirm the judgment or order of the district court or decision of the Tax Court, enforce or deny review of a decision or order of an administrative agency, or dismiss the appeal or petition for review for lack of jurisdiction or otherwise, and determines that a written opinion will have no

precedential or institutional value."

6.2.2 A judgment, order may be used when:

(a) The judgment of the district court is based on findings of fact which are not clearly erroneous;

(b) Sufficient evidence supports a jury verdict;

(c) Substantial evidence on the record as a whole supports a decision or order of an administrative agency;

(d) No error of law appears;

(e) The district court did not abuse its discretion on matters addressed thereto; or

(f) The court has no jurisdiction.

2. 17 C.F.R. section 240.14a-9(a) provides:

> "No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading"

3. F. R. Civ. P. 52(a) provides:

"Findings of fact, whether based on oral or documentray evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses"

4. 8 Del. C. section 141(b) provides:

"Each director shall hold office until his successor is elected and qualified or until his earlier resignation or removal. Any director may resign at any time upon written notice to the corporation"